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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 799

CLEMENT V. CONOLE, ET AL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 365 F. 2d 306. The opinion of the district court (R. 313–317) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1966. The petition for a writ of certiorari was filed on November 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the adjudication of contempt for willful disobedience of a temporary restraining order.

242-088—66

2. Whether the procedure at the contempt hearing was fair.

3. Whether petitioners, who were fined for criminal contempt, should have been tried by a jury.

STATEMENT

After a hearing pursuant to Rule 42(b), F.R. Crim. P., in the United States District Court for the Eastern District of Pennsylvania, petitioners were found guilty of criminal contempt arising from violation of the court's temporary restraining order in a civil case (R. 313–317). The court fined petitioners as follows: Clement V. Conole, $5,000; Meyers, $3,000; Lincoln, $2,000; Richard C. Conole, Callahan and Anable, $1,000 each (R. 413–422). The court of appeals affirmed the convictions, but reduced all fines by ninety percent.

The civil action out of which this proceeding arose involved the management control of Business Supplies Corporation of America, whose stock was owned equally by Stanley Crandall, plaintiff in the civil action, and Clement V. Conole, the principal defendant therein. Crandall was chairman of the executive committee. Clement Conole was chairman of the board of directors; Richard Conole, president; and the other petitioners were members of the board of directors (R. 69, 343, 23). On the evening of Friday, February 7, 1964, Crandall received notice that a special meeting of the board of directors would be held on the following Monday, February 10, at 10:00 a.m., at one of the company's offices in Bryn Mawr, Pennsylvania. Among the matters to be taken up, according to the

notice, were amendments to the corporation's by-laws to authorize (a) the removal of any director by majority vote of the board of directors (rather than by majority vote of the stockholders as provided by the existing arrangement); (b) the execution of employment contracts with key executives and the ratification of all existing employment contracts, also without the previously required approval of a majority of the stockholders; and (c) the issuance of stock options, in an amount not to exceed $200,000, to not more than ten key executives (R. 47, 12–14).

At 8:52 a.m. on the following Monday, February 10, the United States District Court for the Eastern District of Pennsylvania ordered a hearing to be held on February 13 on Crandall's application for a temporary injunction. A temporary restraining order was issued prohibiting favorable action on the proposed amendments to the by-laws or any other action which would tend to destroy the equality of control of the corporation by Crandall and Clement Conole (R. 15–18, 313). Crandall, his three attorneys and a deputy marshal then drove to Bryn Mawr and entered the directors' meeting at about 10:15 a.m., where the marshal served the papers. Crandall and his counsel subsequently reported to the court[1] that copies of the pleadings and temporary restraining order were served by a deputy marshal who stated that there was a restraining order among the papers. Mr. Conole, who was presiding, told the marshal that

[1] Counsel first made a statement and then Crandall and two directors gave sworn testimony (R. 19–30).

he had entered the meeting improperly and should withdraw. After the marshal and Crandall's counsel withdrew, the meeting continued and petitioners approved the amendments, with Crandall and two others dissenting (R. 22–27). The court said that, on this representation, petitioners had clearly violated the terms of the order. It directed that subpoenas requiring the appearance of each of petitioners on February 13 be issued and served immediately, as one of the directors was planning to leave that day for California (R. 28–29).

On February 13, 1964, petitioners were served with an order to show cause why they should not be adjudged guilty of criminal contempt, pursuant to Rule 42(b), F.R. Crim. P. (R. 31–34). Answer thereto was filed on February 28 and hearing thereon was held on March 2, 3, 4 and 5 (R. 35–39, 1).

At the hearing, Crandall, the two other dissenting directors and the deputy marshal who served the papers testified that when the deputy served the papers, he twice mentioned that there was a restraining order and that Clement Conole said, "This meeting is still in session. Get out" (R. 67, 70, 79). Crandall and the other directors testified that after the papers had been served and the marshal and attorneys had withdrawn, the meeting continued. Mr. Conole proposed that a resolution to amend the by-laws be passed. Crandall pointed out that such action would be illegal under the restraining order. Nevertheless, Mr. Conole, who was presiding, requested a vote on the resolution itself and it was passed by a vote of six-to-three. Similarly, the directors voted

on the employment contracts, although Mr. Crandall read the restraining order to them and also requested that they rescind the action already taken on the by-laws (R. 71–73, 80–81, 83–84).

Mr. Clement Conole testified that the man who distributed the papers did not identify himself and did not say anything (R. 154). Conole asked those not directors to leave and the meeting took up the resolution. Conole said that "there was a question whether we could vote on it, that there were a great many questions as to the validity of the process that had taken place" and that he suggested that they proceed with the meeting with the understanding that any action would be subject to whether the process was in order (R. 155–157). He testified on cross-examination that there was a great deal of confusion (R. 168) and that there was no discussion on the floor that the actions taken would be conditional but that he assumed in his own mind that the actions taken were conditional (R. 170). The other petitioners testified that it was their understanding that if the papers that had been served were legal, the actions of the board were null and void (R. 209, 230, 242, 256, 267).[2]

The trial court found that Clement Conole had declared that the entry of the marshal into the meeting was illegal, but that at no time was any action taken on a conditional basis; that although petition-

[2] The three directors who voted against amendment of the by-laws testified that Clement Conole questioned the legality of what had just taken place but made no statement that the action of the board was conditional (R. 75, 82, 83, 84).

ers were apprised of the contents of the order, they willfully and contumaciously proceeded to amend the by-laws in a manner prohibited by the court (R. 315–316).

ARGUMENT

This is a proceeding for criminal contempt, and, as such, is governed procedurally by the Rules of Criminal Procedure. *Moore* v. *United States*, 150 F. 2d 323 (C.A. 10), certiorari denied, 326 U.S. 740. The petition for a writ of certiorari, filed ninety days after the decision of the court of appeals,* is thus out of time under Rule 22–2 of the Rules of this Court. There is, in any event, no question warranting review by this Court.

1. The petitioners complain (Pet. 11–15) that the court of appeals did not, in its opinion, discuss their attack on the sufficiency of the evidence, stating merely that the "judgments were based upon factual determinations" that petitioners "had willfully disobeyed a temporary restraining order." Petitioners admit that the only issue at the trial for contempt was whether the vote had been conditional or unconditional (Pet. 12). This, in turn, depended upon the credibility of the witnesses and had been resolved against petitioners by the trial court on ample evidence. There was no occasion for the court of appeals to discuss the evidence in detail.

2. Petitioners were accorded due process at the hearing. The order to show cause was served on February 13, and the hearing did not begin until

*November 24, 1966, the ~~nineteenth~~ ninetieth day after the entry of judgment, was a holiday.

March 2. There was never a request that another judge hear the matter. Nor would there have been basis for such a request under Rule 42(b), F.R. Crim. P. When the occurrences were first reported to the judge in sworn testimony *ex parte,* he stated that if the testimony were true a contempt had been committed. That statement did not mean that the trial judge was personally embroiled in the controversy. Cf. *Offutt* v. *United States,* 348 U.S. 11.

The judge heard lengthy testimony by Conole as to intercorporate disputes preceding the events of February 10 (R. 85–149), although he did grant motions to strike such testimony (R. 131–132, 149) and refused to hear testimony from other directors as to events before February 10 (R. 201–202) or to allow Crandall to be examined about such events (R. 280–283). It is difficult to see what bearing such testimony could have had on the admittedly narrow issue of whether the directors had voted conditionally or unconditionally in violation of a temporary restraining order, which stayed action for three days. This testimony does not, as petitioners now argue (Pet. 17), fall within the rule that evidence is admissible for the purpose of showing plan or design. Crandall's plan or design was irrelevant to the issue of petitioners' intent to violate the court order.

3. There was neither a request for jury trial nor any occasion for it. *Cheff* v. *Schnackenberg,* 384 U.S. 373; *In re Holland Furnace Company,* 341 F. 2d 548 (C.A. 7), certiorari denied, 381 U.S. 924. The limitations on punishment in *Cheff,* imposed by this Court as a matter of judicial administration, do not

extend to fines, and assuredly not to the reduced fines to which petitioners are subject after the court of appeals' revision of the sentences.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

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